Supreme Court U.S.
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No. 05-1194 MAR 16 2006

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In The
Supreme Court of the United States

THE METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY, TENNESSEE,

Petitioner,

v.

DEJA VU OF NASHVILLE, INC., a Tennessee corporation; MICHAEL RUCKER, individually; MICHAEL BUTLER, individually; MERONEY ENTERTAINMENT, INC. (d/b/a Ken's Gold Club), a Tennessee corporation; THE PLEASURE PALACE, INC., a Tennessee corporation; DAWN PIERCE, individually; ELIZABETH MARTZ, individually; JERRY C. PENDERGRASS, individually; THE 822 CORPORATION; and 421 CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX VOLUME I, Pages 1a-179a

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QUESTIONS PRESENTED

(1) Does a final judgment confirming a plaintiff's status as a "prevailing party" for purposes of 42 U.S.C. § 1988, followed by a United States Supreme Court decision in another case that invalidates the theory on which the plaintiff prevailed, qualify as "special circumstances" that render the attorneys' fees award unjust?

(2) Did the United States Supreme Court's decision in *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004), invalidate the theory on which Respondents prevailed on the merits?

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Supreme Court Rule 14.1(b), the parties to the proceedings below are as indicated in the caption of this petition. Because Petitioner is a governmental entity, no corporate disclosure statement is required under Supreme Court Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

The Metropolitan Government of Nashville and Davidson County, Tennessee respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Sixth Circuit is reported at 421 F.3d 417. (App. 1a-16a.) The Sixth Circuit's order denying rehearing and rehearing *en banc* is unreported. (App. 201a-202a.) The district court's opinions and orders (App. 18a, 76a, 77a-78a) as well as the Reports and Recommendations of the Magistrate Judge (App. 19a-27a, 79a-106a) are unreported.

STATEMENT OF JURISDICTION

The opinion and judgment of the Sixth Circuit was entered on August 31, 2005. (App. 1a-16a, 17a.) A petition for rehearing and rehearing *en banc* was denied on December 16, 2005. (App. 201a-202a.) This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents initiated this action against Petitioner as a civil rights claim for damages under 42 U.S.C. § 1983 and were later awarded attorneys' fees pursuant to 42 U.S.C. § 1988. Specifically, Respondents challenged the

constitutionality of Chapter 6.54 of the Metropolitan Code of Laws as having violated their First and Fourteenth Amendment rights under the United States Constitution. The Appendix reproduces the version of Chapter 6.54 applicable to this case as well as the First Amendment and Fourteenth Amendment. The 1997, 1998, and 2002 versions of T.C.A. § 27-9-111, the Tennessee writ of certiorari statute, are also included.

STATEMENT OF THE CASE

1. Preliminary Proceedings

On August 19, 1997, the Council of the Metropolitan Government of Nashville and Davidson County enacted Chapter 6.54 of the Metropolitan Code of Laws, Bill No. 097-796 ("Chapter 6.54"). Among other things, the ordinance required adult-oriented businesses to obtain a license to operate and required entertainers who perform in those businesses to obtain a permit. It imposed a regulatory scheme upon adult-oriented businesses designed to address the deleterious secondary effects of those businesses.

Respondents are owners and operators of adult businesses, including cabarets, adult bookstores, and adult video stores in Metropolitan Nashville and Davidson County, Tennessee, as well as individual entertainers who perform at such establishments. On October 17, 1997, Respondents filed an action under 42 U.S.C. § 1983 against the Metropolitan Government of Nashville and Davidson County ("Metropolitan Government") and Emmett Turner, the former Chief of Police, in his official capacity, alleging that Chapter 6.54 violated their First

and Fourteenth Amendment rights under the United States Constitution. Respondents sought a preliminary injunction, a permanent injunction, and a declaratory judgment as to the constitutionality of Chapter 6.54. On November 10, 1997, the plaintiffs in a subsequently filed case moved to intervene as plaintiffs in the initial case because they alleged similar constitutional injuries and sought similar relief. The cases were subsequently consolidated.

On December 8, 1997, the United States District Court for the Middle District of Tennessee enjoined the Metropolitan Government from enforcing any of the provisions of Chapter 6.54, holding that the ordinance failed to guarantee prompt judicial review of decisions by the Sexually Oriented Business Licensing Board. (Mem. & Order, App. 180a-181a, 182a-200a.) To remedy the infirmities that the court found, the Metropolitan Council amended Chapter 6.54, and the Tennessee General Assembly adopted 1998 Tennessee Public Acts Chapter 794 (App. 272a-274a), which amended the Tennessee writ of certiorari statute, T.C.A. § 27-9-111. By order entered December 3, 1998, the district court dissolved the injunction. (Mem. & Order, App. 162a-163a, 164a-179a.) Respondents appealed the dissolution of this first injunction to the Sixth Circuit Court of Appeals (Appeal #99-5071).

On December 18, 1998, Respondents filed a second motion for a preliminary injunction, asserting new grounds that they had not asserted in their first motion. A three-day hearing on the motion was held in April of 1999. By order entered October 4, 1999, the district court granted Respondents' second motion for preliminary injunction, finding that the definitions of "sexually oriented" and "sexually oriented theater," the civil disabilities

provision, the disclosure provision, and the fee amounts were unconstitutional. (Mem. & Order, App. 109a, 110a-161a.) Because the court found that the offending provisions could not be severed from the ordinance, it enjoined the Metropolitan Government from enforcing Chapter 6.54. (Mem., App. 161a.) By order entered December 23, 1999, the preliminary injunction was made permanent. (App. 107a-108a.) The Metropolitan Government appealed this order, and Respondents cross appealed (Appeals #00-5287, #00-5288).

Shortly after the district court issued its memorandum opinion granting the second preliminary injunction, the Metropolitan Government amended Chapter 6.54 to remedy the four issues raised by the district court in granting injunctive relief. Based on those amendments, the Metropolitan Government filed a motion to vacate or dissolve the injunction in the district court. The district court denied that motion for lack of jurisdiction. The Metropolitan Government appealed that order of the district court (Appeal #00-5881).

All appeals were then consolidated before the Sixth Circuit Court of Appeals. The Sixth Circuit Court of Appeals in *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville and Davidson County*, 274 F.3d 377 (6th Cir. 2001) ("*Deja Vu I*"), found the bulk of Respondents' challenges to Chapter 6.54 to be without merit. *Id.* at 387-98. On the other hand, the court enjoined enforcement of the ordinance because it found that Chapter 6.54 did not guarantee "prompt judicial review." *Id.* at 400-03. It also found that the term "sexually oriented" was overbroad but could easily be severed and stricken from the ordinance. *Id.* at 389. This Court then denied certiorari. *Metro. Gov't*